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17 **UNITED STATES DISTRICT COURT**
18 **CENTRAL DISTRICT OF CALIFORNIA**

19 VERNON UNSWORTH,

Case No. 2:18-cv-08048-SVW (JCx)
Judge: Hon. Stephen V. Wilson

20 Plaintiff,

21 v.
22 ELON MUSK,
23
24 Defendant.

**PLAINTIFF VERNON UNSWORTH'S
OBJECTION TO JURY INSTRUCTION #2
AND PROPOSED ALTERNATE
INSTRUCTION**

25 Pretrial Conference: Dec. 2, 2019
Time: 2:30 p.m.
Courtroom: 10A

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1 Plaintiff Vernon Unsworth respectfully submits this objection to the Court's
2 Jury Instruction #2 on presumed damages, (*see* Doc. 137 pp. 4, 13), and proposes an
3 alternate instruction that remedies an error of law contained in CACI § 1702, upon
4 which the Court relied.

5 **I. CACI § 1702 Erroneously Purports to Bar Recovery of Presumed**
6 **Damages in Addition to General Actual Damages.**

7 Relying on CACI § 1702, the Court has indicated that it intends to charge the
8 jury that Unsworth can recover presumed damages only if he does not recover
9 general actual damages. (*See* Doc. 137 at 4, 13). General damages are those for
10 harm to reputation and for shame, mortification, or hurt feelings, and include both
11 actual and presumed damages. *See Gomes v. Fried*, 136 Cal. App. 3d 924, 939 (Ct.
12 App. 1982). The Court's proposed instruction on damages is taken from a pattern
13 instruction (CACI § 1702) that appears to contain a scrivener's error and is contrary
14 to undisputed California law. "The CACI is not binding authority," and CACI's
15 instructions "do not absolve the courts of their responsibility for interpreting
16 California law." *Cal.-Agrex, Inc. v. Van Tassell*, No. C-07-0964 SC, 2008 U.S. Dist.
17 LEXIS 7708, at *5 n.1 (N.D. Cal. Jan. 22, 2008).

18 *First*, CACI § 1702 is inconsistent with the two other CACI instructions on
19 defamation *per se*. CACI has three distinct instructions for defamation *per se* in
20 order to distinguish between private and public figures and private and public
21 matters. *See* CACI §§ 1700, 1702, and 1704. Two of these three sections correctly
22 allow a plaintiff to recover presumed damages *and* actual damages:

23 **Even if** [name of plaintiff] has not proved any actual damages for harm
24 to reputation or shame, mortification or hurt feelings, the law assumes
25 that [he/she] has suffered this harm. Without presenting evidence of
26 damage, [name of plaintiff] is entitled to receive compensation for this
27 assumed harm

28 CACI §§ 1700, 1704 (pp. 98, 1002) (emphasis added).

1
2 By contrast, CACI § 1702 omits the word “even” and thereby erroneously
3 suggests that a plaintiff can recover presumed damages only if he does not recover
4 actual damages:

5 If [name of plaintiff] has not proved any actual damages for harm to
6 reputation or shame, mortification, or hurt feelings but proves by clear
7 and convincing evidence that [name of defendant] knew the
8 statement(s) [was/were] false or that [he/she] had serious doubts about
9 the truth of the statement(s), then the law assumes that [name of
10 plaintiff]’s reputation has been harmed and that [he/she] has suffered
11 shame, mortification, or hurt feelings. Without presenting evidence of
12 damage, [name of plaintiff] is entitled to receive compensation for this
13 assumed harm

14 CACI § 1702 (emphasis added). Given that California law rejects this restriction,
15 the only logical explanation for this difference is a scrivener’s error.¹

17 ¹ The extra limitation in section 1702 cannot be explained by the fact that the
18 instruction addresses a private figure claim on a matter of public concern. For
19 example, Section 1700 provides the defamation *per se* instruction in a public
20 figure case, which triggers the First Amendment requirement to prove actual
21 malice for the plaintiff to recover any damages. CACI § 1700 (pp. 981-82). Yet
22 Section 1700 allows for the recovery of both presumed and actual general
23 damages, as there is no First Amendment prohibition on recovering both when
24 actual malice is proven. *Id.* Section 1704 addresses a private figure claim for
25 defamation *per se* on a private matter, and likewise allows for recovery of both
26 presumed and actual general damages. CACI § 1704 (pp. 1002-03). The
27 instruction at issue, Section 1702, applies to private figure defamation *per se*
28 claims on a matter of public concern—thus requiring proof of actual malice to
recover presumed (and punitive) damages. CACI § 1702 (pp. 993-94). There is
no basis in law for depriving a private figure involved in a matter of public
concern from recovering both presumed and actual general damages, while
allowing a public figure to recover both. If anything, public figures face more
stringent limitations than private figures.

1 Second, CACI § 1702 as written is contrary to California law, which allows
 2 a plaintiff to recover both actual and presumed general damages. In *Weller v.*
 3 *American Broadcasting Companies, Inc.*, 232 Cal. App. 3d 991 (1991), the court
 4 affirmed a jury of award of both general actual damages and presumed damages. *Id.*
 5 at 1014. In *Weller*, “[t]he jury returned a general verdict that [defendants] were
 6 liable to Weller [for] general damages in the amount of \$1 million for mental
 7 suffering, \$500,000 for proven injury to reputation and \$500,000 for presumed
 8 damages to reputation.” *Id.* at 998. The court rejected the argument that awarding
 9 general damages for both actual damages and presumed damages was a “double
 10 recovery.” *Id.* at 1014. The court held that even “if a plaintiff offers proof of actual
 11 injury to reputation,” it does not mean “that he has proved or can prove all the likely
 12 effects of the damage to his reputation.” *Id.* The court recognized that the alternative
 13 would be fundamentally unfair:

14 If we were to accept . . . that presumed damages are available only in
 15 lieu of damages for proven injury to reputation, the plaintiff who can
 16 prove \$1 of actual injury would be precluded from further recovery,
 17 whereas the plaintiff who cannot marshal *any* evidence of actual injury
 18 would not be so limited.

19 *Id.* As the law recognizes, just because a plaintiff can prove *some* damage for
 20 defamation does not mean he or she can prove *all* the damage.

21 *Weller* is not alone in allowing recovery for general presumed and actual
 22 damages. In *Alberts v. Franklin*, 2004 WL 1345078 (Cal. Ct. App. June 16, 2004),
 23 the plaintiff recovered actual damages for harm to reputation and emotional distress,
 24 and also recovered presumed damages for harm to reputation:

25 A logical and reasonable explanation for the jury’s defamation verdict
 26 and answer to the court’s supplemental question is that the jury awarded
 27 James (1) *actual* general damages for his emotional distress and injury
 28 to his reputation *shown by the evidence*, and (2) *presumed* general

1 damages, not necessarily shown by the evidence, for the injury to his
2 reputation based on the court’s determination that four of the statements
3 at issue were defamatory *per se*.

4 *Id.* at *23 (italics in original); *see also Peterson v. Stewart*, 2012 WL 541521, at *10
5 (Cal. Ct. App. Feb. 17, 2012) (awarding \$500 in actual damages and \$150,000 in
6 presumed damages, without describing allocations to harm to reputation versus
7 shame, mortification, and hurt feelings).

8 *Third*, the authority cited by CACI § 1702 does not hold that awards of actual
9 damages and presumed damages are mutually exclusive. To the contrary, a case
10 cited by CACI § 1702 affirmed a judgment that awarded both actual and presumed
11 damages. *See Khawar v. Globe Int’l, Inc.*, 19 Cal. 4th 254, 261-62 (1998), *as*
12 *modified* (Dec. 22, 1998) (affirming jury award for “\$100,000 for injury to . . .
13 reputation, \$400,000 for emotional distress, [and] \$175,000 in presumed damages”).

14 *Fourth*, CACI § 1702 itself relies on the California Civil Jury Instructions,
15 which correctly allow a plaintiff to recover both actual and presumed general
16 damages. *See* Cal. Jury Instr.--Civ. 7.10 (BAJI 7.10 Libel/Slander—General or
17 Compensatory Damages); Cal. Jury Instr.--Civ. 7.10.1 (BAJI 7.10.1 Presumed
18 General Damages). In fact, in one case cited in CACI § 1702, the California court
19 of appeals approved the relevant California Civil Jury Instructions and affirmed a
20 general damages award without regard to whether it was based on only actual
21 damages or actual and presumed damages. *See Sommer v. Gabor*, 40 Cal. App. 4th
22 1455, 1472-73 (1995).

23 In short, CACI § 1702’s approach to actual and presumed general damages
24 is a stark and unsupportable outlier—contrary to CACI’s own treatment of
25 defamation *per se*, to California law, to the cases cited by CACI, and to the
26 California Civil Jury Instructions. Because “[t]he CACI is not binding authority”
27 and “do not absolve the courts of their responsibility for interpreting California law,”
28

1 it would be error to instruct the jury using CACI § 1702 without modification. *See*
2 *Cal.-Agrex, Inc.*, 2008 U.S. Dist. LEXIS at *5 n.1.

3 **II. Unsworth's Proposed Alternate Instruction.**

4 Unsworth respectfully requests that the Court refrain from issuing the
5 erroneous portion of CACI § 1702, and that the Court instead issue the following
6 instruction on assumed damages that resolves the error in the pattern charge by
7 correcting the opening phrase:

8 Even if Mr. Unsworth has not proved any actual damages for harm to
9 reputation or shame, mortification, or hurt feelings, if Mr. Unsworth
10 proves by clear and convincing evidence that Mr. Musk knew the
11 statements were false or that he had serious doubts about the truth of
12 the statements, then the law assumes that Mr. Unsworth's reputation
13 has been harmed and that he has suffered shame, mortification, or hurt
14 feelings. Without presenting evidence of damage, Mr. Unsworth is
15 entitled to receive compensation for this assumed harm in whatever
16 sum you believe is reasonable. To award assumed damages, you must
17 award at least a nominal sum, such as one dollar.

18 *See* CACI §§ 1700, 1702, 1704.

19 **CONCLUSION**

20 Unsworth submits this objection out of an abundance of caution, recognizing
21 that the Court's proposed instruction on assumed damages may not necessarily
22 reflect the Court's intention to limit Unsworth from obtaining both actual and
23 assumed damages, and to ensure that the Court possesses the pertinent authority on
24 the subject. Accordingly, Unsworth requests that the Court provide his proposed
25 alternative instruction, as it correctly states the undisputed law. Consistent with the
26 Court's Pretrial Order, Unsworth will be prepared at the conference on December 2,
27 2019, to address further objections, if any, to the Court's proposed instructions.

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1 Dated: November 29, 2019 L. LIN WOOD, P.C.

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3 By: /s/L. Lin Wood
4 L. Lin Wood
5 *Attorneys for Plaintiff Vernon Unsworth*

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